STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSEPH MILLER,

Defendant-Appellee.
_____/

Supreme Court No. 149502

Court of Appeals No. 314375

Leelanau Cir. Ct. No. 12-1777-FH

THE PEOPLE OF THE STATE OF MICHIGAN APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court granted leave to appeal on October 22, 2014. This Court has jurisdiction pursuant to MCL 770.3(6); MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

A jury convicted Defendant Joseph Miller of violating MCL 257.625(1)(a) (operating a motor vehicle while intoxicated), and MCL 257.625(5) (operating a motor vehicle while intoxicated, or while visibly impaired, or while having any amount of a specified controlled substance in his body, and causing serious injury). The Court of Appeals reversed the conviction under subsection 1 on the basis of the multiple-punishments strand of the Double Jeopardy Clause.

1. Whether the state and federal Double Jeopardy Clauses, US Const, Am V, and Const 1963, art 1, § 15, prohibit punishment for both the compound offense of Operating While Intoxicated (OWI) causing serious injury, MCL 257.625(5), and its predicate offense of OWI, MCL 257.625(1) and (9)(a), where both the compound and predicate offenses have alternative elements, i.e., where each offense has an element that the other does not.

   The People's answer: No.

   Defendant's answer: Yes.

   The trial court did not answer this question because it was not raised below.

   Court of Appeals' answer: Yes.

Authority: *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008).

2. Whether the existence of prior convictions under MCL 257.625(9)(c) amounts to an element of OWI causing serious injury for purposes of the state and federal Double Jeopardy Clauses.

   The People's answer: No.

   Defendant's answer: Unknown.

   The trial court did not answer this question because it was not raised below.

   Court of Appeals' answer: No.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution commands that no "person be subject for the same offence to be twice put in jeopardy of life or limb." US Const, Am V. Similarly article 1, § 15 of the Michigan Constitution states, "No person shall be subject for the same offense to be twice put in jeopardy."

STATUTE INVOLVED

Subsection 1 of MCL 257.625 provides:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:
>
> (a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.
>
> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2018, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> (c) The person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

Subsection 3 of MCL 257.625 provides:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating

subsection (1), a finding of guilty under this subsection may be rendered.

Subsection 5 of MCL 257.625 provides:

A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.

Subsection 8 of MCL 257.625 provides:

A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

INTRODUCTION AND SUMMARY OF ARGUMENT

A jury convicted Miller of operating a motor vehicle while intoxicated contrary to MCL 257.625(1)(a), and also of operating a motor vehicle while intoxicated, or visibly impaired, or with any amount of a controlled substance and causing serious injury of another person contrary to MCL 257.625(5). The Court of Appeals vacated Miller's conviction and sentence for operating a motor vehicle upon a highway while intoxicated contrary to MCL 257.625(1)(a), third offense. *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 11, 2014 (Docket No. 314375) (9a–13a.). The Michigan Court of Appeals vacated Miller's conviction under subsection 1(a) because it concluded that the conviction violated the multiple punishments prong of the Double Jeopardy Clause where he had also been convicted of violating subsection 5. The Court of Appeals looked to the same-elements test from *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), and concluded the Double Jeopardy Clause was violated because MCL 257.625(1)(a) does not require an element that is distinct from MCL 257.625(5).

The Court of Appeals clearly erred in its analysis. As this Court explained in *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008), a correct application of the *Blockburger* test involves looking to the elements of the two crimes in the abstract and asking whether it is possible to commit the first crime without committing the second crime, and also possible to commit the second crime without committing the first crime. If the answer to both questions is yes, there is no violation of the Double Jeopardy Clause. 481 Mich at 241.

This Court should reverse and reinstate Miller's MCL 257.625(1)(a), conviction because a person may violate subsection 1 without violating subsection 5: the person could drive while intoxicated (thereby violating subsection 1) without causing "serious impairment of a body function" of another person (as subsection 5 requires). It is also true that one can violate subsection 5 without violating subsection 1. This can occur because a conviction under subsection 5 is allowed not just if there is a violation of subsection 1, but also for violations of subsection 3 or subsection 8. MCL 257.625(5) ("A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) . . . ."). For example, a person could seriously injure another by driving while having any amount of a specified controlled substance in his body (thereby violating subsection 5 via subsection 8) without having enough of the substance to be legally intoxicated (as subsection 1(a) requires). Though a defendant may cause serious injury to a person while operating a motor vehicle while intoxicated, any of the three enumerated ways of violating MCL 257.625(5) will do. Applying the *Ream* test shows Miller's double-jeopardy rights were not violated. The Court of Appeals' judgment should be reversed because it is in direct conflict with this Court's decision in *Ream*. Such a holding would also properly hold Miller fully accountable for all of his criminal conduct.

STATEMENT OF FACTS

The facts are not in dispute. On June 28, 2012, defendant Joseph William Miller, who was on probation for OWI second offense (39a, 16a), was picked him up after work by his girlfriend Rosa Cuellar. (23a.) That evening, the couple went to a concert, where both drank alcohol. (24a.) After the concert, they drove home in Cuellar's car. (25a.) After getting into an argument, Cuellar decided to drive Miller back to his own house. (26a.) But, at some point, she changed her mind and decided to drive home. (28a.) During the drive, they were arguing, and Cuellar testified that she remembered hitting Miller's arm in order to get his attention. (29a.)

Cuellar's car was traveling northbound on M-22 when it veered abruptly to the right, struck a very large boulder on the side of the road, and went airborne. (18a.) The top of the roof struck a tree, trapping Cuellar in her car. (*Id.*) Cuellar called 911 and told the operator that "I'm next to a tree because [Miller] moved my steering wheel." (31a.) Cuellar was in obvious distress during the call, repeatedly asking the operator to send help and complaining of pain in her head. (*Id.*) Cuellar also informed the operator that "he [Miller] turned the steering wheel" and that "[h]e was mad and we were fighting." (*Id.*) Cuellar thus confirmed that Miller had turned the wheel because he was mad about something. (*Id.)* But when Deputy Duane Wright questioned Cuellar at the scene, she told him she did not remember what happened. (19a.)

Sergeant Terrance Cadieux testified that the road was dry at the time of the crash. No dead animals or animal tracks provided a reason for Cuellar's car to

suddenly veer off the road. (33a–34a.) No evidence suggested that Cuellar's car was trying to avoid another vehicle. (34a–35a.)

Cuellar was treated at the hospital for a broken collarbone and a concussion. (30a.) She told Larry Alexander, the physician's assistant who treated her at the emergency room, that the crash happened because Miller "grabbed the wheel." (32a.) At trial, Cuellar testified that she had no memory of the crash. (26a–27a.) Deputy Wright obtained a warrant to test both Cuellar's and Miller's blood-alcohol levels. Cuellar had a blood-alcohol level of .12, while Miller's blood-alcohol level was .17. (20a–22a.)

PROCEEDINGS BELOW

The jury deliberated for 31 minutes before finding Miller guilty of operating while intoxicated, MCL 257.625(1)(a), and operating while intoxicated causing serious injury to another person, MCL 257.625(5). (36a–38a.) Miller was sentenced to concurrent terms of five years of probation, with the first 9 months served in county jail. (20a–22a.)

On appeal Miller argued that allowing both of his convictions to stand violated the multiple-punishments prong of the Double Jeopardy Clause. The Michigan Court of Appeals agreed and vacated his conviction under MCL 257.625(1)(a). *People v Miller*, (9a–13a.) The People filed a motion for reconsideration pointing out that the Court of Appeals' analysis was contrary to *People v Ream*. The Court of Appeals denied the People's motion in a summary

order. *People v Miller,* unpublished order of the Court of Appeals, entered April 24, 2014 (Docket No. 314375) (14a.)

This Court granted the People's application, entering the following order:

> On order of the Court, the application for leave to appeal the March 11, 2014 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall include among the issues to be briefed whether the state and federal Double Jeopardy Clauses, US Const, Am V, and Const 1963, art 1, § 15, prohibit punishment for both the compound offense of Operating While Intoxicated (OWI) causing serious injury, MCL 257.625(5), and its predicate offense of OWI, MCL 257.625(1) and (9)(a), where both the compound and predicate offenses have alternative elements. Compare *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008), with *United States v Dixon*, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993), and *People v Wilder*, 485 Mich 35; 780 NW2d 265 (2010). The parties shall also include among the issues to be briefed: (1) whether the existence of prior convictions under MCL 257.625(9)(c) amounts to an element of OWI causing serious injury for purposes of the state and federal Double Jeopardy Clauses and, accordingly, (2) whether punishment for both third-offense OWI, MCL 257.625(9)(c), and OWI causing serious injury amounts to impermissible multiple punishment under the Double Jeopardy Clauses, or whether each offense has an element that the other does not. [*People v Miller*, 496 Mich __; 854 NW2d 715 (2014).] (15a.)

STANDARD OF REVIEW

A double-jeopardy challenge presents a question of constitutional law that this Court reviews de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Because Miller did not raise a double-jeopardy claim in the trial court, his unpreserved constitutional claim of error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

ARGUMENT

I. Convicting and sentencing a defendant for violating both subsection 1 and subsection 5 of MCL 257.625 does not violate the multiple-punishments prong of the Double Jeopardy Clause because it is possible to violate each subsection without violating the other.

A. Under this Court's precedents, the double-jeopardy analysis focuses on the abstract elements of the offenses.

The United States and Michigan Constitutions command that no person be put in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. The Fifth Amendment's Double Jeopardy Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v Maryland*, 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

These double-jeopardy provisions provide three protections, the third of which is at issue in this case: (1) they protect against a second prosecution for the same offense after acquittal, (2) they protect against a second prosecution for the same offense after conviction, and (3) they protect against multiple punishments for the same offense. *People v Nutt,* 469 Mich 565, 574; 677 NW2d 1 (2004).

One of the basic protections afforded by the Double Jeopardy Clause is protection against multiple punishments for the same offense. *Brown v Ohio*, 432 US 161, 165; 97 S Ct 2221; 53 L Ed 2d 187 (1977). Double-jeopardy protections in the federal and state constitutions prohibit multiple convictions and punishments for the same offense. *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008).

"[T]he question under the Double Jeopardy Clause whether punishments are multiple is essentially one of legislative intent[.]" *Ohio v Johnson*, 467 US 493, 499;

104 S Ct 2536; 81 L Ed 2d (1984). If the Legislature expressed a clear intention to impose multiple punishments, the constitutional protections against double jeopardy are not offended. *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007). With respect to multiple punishments, the double-jeopardy protection restrains the prosecution and the courts, not the Legislature. *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998). The Double Jeopardy Clause does not encumber the Legislature's authority to establish more than one penalty for the same offense. *Id.*

But, when there is no clear legislative intent, to determine if the convicted offenses violated the multiple punishment strand of the Double Jeopardy Clause, it is appropriate to apply the test of *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932);[1] *Ream*, 481 Mich at 239–240; *Smith*, 478 Mich at 296, 316. The correct focus, and the proper method to ascertain whether the Legislature intended to impose multiple punishments, is an analysis driven by the abstract elements of each crime, as set forth in *Blockburger*. *Ream,* 481 Mich at 225–226, 228–229, 232. As this Court explained in *Ream*, "[b]ecause the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements." *Id.* at 238. This holding of *Ream* is premised on *Blockburger* and it is apparent that Legislative intent is derived from the

[1] In *Blockburger*, 284 US at 301, the defendant was charged with, among other things, violating two separate statutes by virtue of one drug sale. He claimed that separate punishments for each count were barred by double jeopardy because they arose from the same act. *Id.* The Court unequivocally rejected the defendant's argument with the rule stated above, holding that a defendant could receive separate punishment for each statute that his single act violated.

Legislature's words not in the particular facts of a case. It also should be noted that the *Blockburger* test is consistent with the Double Jeopardy Clause itself which prescribes multiple punishment for the "same offense" and does not proscribe multiple punishment for the "same conduct." Further, the *Blockburger* test has been characterized as preserving the appropriate separation of powers by focusing the analysis upon legislative intent, rather than upon a defendant's conduct or the proof introduced at a particular trial. *State v Watkins*, 362 SW3d 530, 545–546 (Tenn 2012).

B. An introductory word about terminology and acronyms

In its opinion, the Court of Appeals used the shorthand "OUIL" to describe a violation of subsection MCL 257.625(1)(a). But its shorthand is imprecise and can be misleading, given that one need not be under the influence of alcoholic liquor to violate subsection 1(a). One can violate subsection 1(a) by operating while intoxicated by alcoholic liquor, *or* intoxicated by a controlled substance, a combination of the two, *or* while being under the influence of another intoxicating substance.[2] This Court's grant order used the more accurate acronym of OWI (operating while intoxicated).

Further, the Court of Appeals used the shorthand "OUIL causing serious injury" to describe a violation of MCL 257.625(5). Again, its shorthand is imprecise and can be misleading given that one can violate subsection 5 in three different

[2] Per subsection 1(b) and (c), a driver can also be found to have violated subsection 1 by having a certain level of alcohol content in his blood, breath, or urine.

ways. The first way is to be operating while intoxicated contrary to subsection 1(a). But subsection 5 can also be violated if one is either operating while visibly impaired causing serious injury, contrary to subsection 3, or by having any amount of a specified controlled substance in one's body causing serious injury, contrary to subsection 8. This Court's grant order used the phrase "OWI causing serious injury." This phrase too is not entirely accurate because one does not need to be operating while intoxicated to violate subsection 5. A driver can also violate subsection 5 by operating while visibly impaired, or by operating while having any amount of a specified controlled substance in one's body. The People note that the Michigan Judicial Institute's Traffic Benchbook Vol. 3-Third Edition uses the acronym "OWVI" as shorthand for "operating while visibly impaired."

The Model Criminal Jury Instructions explain that being visibly impaired is a lesser degree of impairment than being intoxicated. Model Criminal Jury Instruction 15.3[3] defines operating while intoxicated (OWI) as follows: "because of drinking alcohol, the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened." In contrast, Model Criminal Jury Instruction 15.4 defines operating while visibly impaired (OWVI) to mean driving "with less ability than would an ordinary careful driver. The defendant's driving ability must have been lessened to the point that it would have been noticed by another person." These instructions are consistent with *People v Lambert*, 395 Mich 296, 305; 235

[3] Effective March 1, 2014, this Court has mandated the use of Model Criminal Jury Instructions in criminal trials. *See* Mich. Ct. Rule 2.512(D), as amended October 30, 2013.

NW2d 338 (1975), which set forth the elements of OWI and OWVI and explained that "[t]he distinction between the crime of driving under the influence of intoxicating liquor and the lesser included offense of driving while ability is visibly impaired is the degree of intoxication which the people must prove." Thus, Jury Instruction 15.4 correctly explains that operating while visibly impaired is a "less serious charge" than operating while intoxicated.

C. The two statutes Miller was convicted of violating have distinct elements.

MCL 257.625(1) forbids a person from operating a motor vehicle upon a highway if the person is operating while intoxicated (OWI). The statute further indicates that one can be intoxicated as the result of:

> (i) being "under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance," MCL 257.625(1)(a),
>
> or
>
> (ii) having an unlawful bodily alcohol content (measured against the operator's breath, blood or urine), MCL 257.625(1)(b) & (c).

In contrast, MCL 257.625(5) forbids a person from "operat[ing] a motor vehicle in violation of subsection 1, 3, or 8 and by the operation of that motor vehicle caus[ing] a serious impairment of a body function of another person." The three subsections involve different predicate crimes:

> Subsection (1): operating a motor vehicle while under the influence of alcoholic liquor, or a controlled substance, or an other intoxicating substance or a combination of these substances, or has an unlawful level of alcohol in his blood, breath or urine,

or

Subsection (3): operating a motor vehicle upon a highway when the person is visibly impaired due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of these substances,

or

Subsection (8): operating a motor vehicle on a highway if the person has in his or her body any amount of a controlled substance listed in the public health code.

And subsection 5 also requires, in addition to the predicate violation, that the person by operation of the vehicle cause serious injury to another person.

D. Under *People v Ream*, if it is possible to commit the first crime without committing the second crime and to commit the second crime without committing the first crime, then there is no violation of the Double Jeopardy Clause.

In *Ream* the defendant was convicted of both first-degree felony murder and the predicate felony (first-degree criminal sexual conduct). 481 Mich at 225. The Court of Appeals vacated the defendant's first-degree criminal sexual conduct conviction and sentence on double-jeopardy grounds. The People appealed and this Court reversed.

This Court reasoned that "[f]irst-degree felony murder does not necessarily require proof of a sexual penetration because first-degree felony murder can be committed without also committing first-degree criminal sexual conduct." *Id.* at 241. Even though on the particular facts of Ream's case, the criminal sexual conduct was the predicate felony for the felony-murder offense, this Court focused on the abstract elements of the offenses and the fact that it was possible for them to

not overlap: "First-degree felony murder is the killing of a human being with malice while committing, attempting to commit, or assisting in the commission of *any* of the felonies specifically enumerated in MCL 750.316(1)(b)." *Id.* (emphasis in original). Because "it is possible to commit the greater offense [first-degree felony murder] without first committing the lesser offense [first-degree criminal sexual conduct]"—"each contains an element the other does not"—the Court concluded "that these offenses are not the 'same offenses' under either the Fifth Amendment or Const 1963, art 1, § 15, and, therefore, defendant may be punished separately for each offense." *Id.* at 241–42.

The fact that it was possible in *Ream* to commit felony-murder by a different predicate felony is parallel to the fact here that the offense in MCL 257.625(5) can be committed without violating subsection 1 (by being "intoxicated") because a person could violate subsection 3 (by operating while visibly impaired) or subsection 8 (by having "any amount of a controlled substance" in one's body).

E. It is possible to commit a violation of subsection 1 without violating subsection 5 and vice versa.

As the following chart shows, the differences between subsection 1 and subsection 5 make it possible to violate one without violating the other.

MCL 257.625	**Elements of Subsection 1**	**Elements of Subsection 5**
Intoxicated	X	
Operating vehicle	X	X
While visibly impaired (predicate offense under subsection 3) *or* with any amount of a controlled substance in body (predicate offense under subsection 8)		X
Causing serious injury to another		X

There is no dispute that one can commit a violation of subsection 1 without violating subsection 5 because subsection 5 requires someone be seriously injured.

Similarly, one can violate subsection 5 by operating while visibly impaired (subsection 3), or by operating with any amount of a specified controlled substance in one's body (subsection 8), even if that amount does not lead to intoxication. Thus, subsection 1 is not a necessarily lesser included offense of subsection 5. Just as first-degree felony murder does not necessarily require proof of first-degree criminal sexual conduct because it can be committed by committing a different predicate offense, so a violation of subsection 5 does not require proof of subsection 1 because a violation of subsection 5 can be premised on a violation of or subsection 3 (visibly impaired), or subsection 8 (any amount of a specified controlled substance in one's body). In fact, in a case where the evidence showed consumption of an alcoholic beverage and use of a controlled substance, a jury would not need to agree on which substance provided the basis for a conviction under subsection 5.

Though a defendant may cause serious injury to a person while operating a motor vehicle while intoxicated, any of the three enumerated ways of violating MCL 257.625(5) will suffice. See *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374; 280 NW2d 793 (1979) (a defendant could be convicted of felony-firearm along with the predicate felony of murder). No single predicate is necessary to find a violation of MCL 257.625(5).

F. The Court of Appeals' analysis is contrary to the *Ream* test.

The Court of Appeals held:

> [I]t cannot be said that MCL 257.625(1) requires an element that is not present in MCL 257.625(5). While one could be convicted of MCL 257.625(5) without having violated MCL 257.625(1), such as by violating MCL 257.625(3) or (8) while causing serious injury to another person, that is not the test. (12a.)

Not only is the first sentence wrong (as already explained), but actually, under *Ream* (a case the Court of Appeals failed to address), that *is* the test.

The Court of Appeals' error becomes clear if one takes the above-quoted paragraph and plugs in the statutes in *Ream*, by substituting "first-degree felony murder" for "MCL 257.625(5)," and "first-degree criminal sexual conduct" for "MCL 257.625(1)." With these substitutions, and other appropriate changes, the Court of Appeals opinion would read as follows:

> [I]t cannot be said that first-degree criminal sexual conduct requires an element that is not present in first-degree felony murder. While one could be convicted of first-degree felony murder without having committed first-degree criminal sexual conduct, such as by committing a different predicate felony, that is not the test.

Thus, the test the Court of Appeals used would find a violation of the Double Jeopardy Clause where this Court said in *Ream* that there was none.

Application of the *Ream* test shows it is not a violation of the multiple punishments prong of the Double Jeopardy Clause to convict someone of violating both subsection 1 and subsection 5. This is because a subsection 5 conviction can be premised on a subsection 3 or a subsection 8 violation. Each crime thus has an element that the other does not. See *Smith*, 478 Mich at 296 ("Because each of the crimes for which defendant here was convicted, first-degree felony murder and armed robbery, has an element that the other does not, they are not the 'same offense' and, therefore, defendant may be punished for each."). In the absence of a double-jeopardy violation, Miller was not entitled to have his conviction for violating MCL 257.625(1)(a) vacated.

G. *United States v Dixon* does not warrant reconsideration of *Ream*.

This Court's grant order suggested comparing *Ream* with *United States v Dixon*, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993). *Dixon* addressed whether defendants who had been prosecuted for criminal contempt of court for violating court orders could subsequently be tried for crimes arising out of the same conduct which was the subject of the contempt prosecution. First, *Dixon* was cited in *Ream,* 481 Mich at 248, suggesting this Court did not deem it incompatible.

Second, the *Dixon* majority[4] overruled *Grady v Corbin*, 495 US 508; 110 S Ct 2084; 109 L Ed 2d 548 (1990), which set out the same-conduct test, and reinstituted the *Blockburger* same-elements test. Thus, *Ream* and *Dixon* are consistent at least to the extent that they both applied the *Blockburger* elements test. Third, *Dixon* was a successive-prosecution case, and not a multiple-punishments case. To the extent there may be any inconsistency, it may be traceable to the fact that *Dixon* was a successive-prosecution case where the Double Jeopardy Clause has unique application. See, e.g., *United States v Maza*, 983 F2d 1004, 1011 (CA 11, 1993) ("for purposes of successive prosecutions, the question of whether a defendant is being put in jeopardy for the 'same offence' cannot be determined solely with reference to the statutory elements of the offenses charged. Rather, there must also be some determination that the underlying facts that gave rise to the first prosecution are, or are not the sole basis for the second.").

H. This Court should not overrule *Ream* to adopt an approach that only considers the specific elements of the crimes at issue in the particular case.

This Court's grant order also suggested comparing *Ream* with *People v Wilder*, 485 Mich 35; 780 NW2d 265 (2010) (15a.). *Wilder* did not cite *Ream*. This, however, is not surprising because *Wilder* did not involve a double-jeopardy

[4] *Dixon* is properly considered a plurality opinion because there was no majority opinion regarding how *Blockburger* was to be applied when considering successive prosecutions for contempt and the underlying criminal conduct. See *United States v Wolfswinkel*, 44 F3d 782, 785 (CA 9, 1995) ("While *Dixon* was a plurality decision, all of the Justices agreed that as a general matter, when a defendant challenges multiple punishments imposed at a single trial, a strict application of the *Blockburger* test to the elements of the charged statutes is appropriate.").

question. Rather, *Wilder* faced the analytically distinct question of whether a lesser conviction was a cognate lesser or a necessarily included lesser offense. Mr. Wilder had a bench trial where he was charged with first-degree home invasion. The trial court convicted Wilder of third-degree home invasion under MCL 750.110a(4)(a). Wilder argued that he had improperly been convicted of a cognate lesser offense. This Court held that when one is dealing with degreed offenses that can be committed in alternative methods "[n]ot all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense." 485 Mich at 44–45. This Court next indicated that "one must examine the offense of first-degree home invasion *as charged* and determine whether the elements of third-degree home invasion *as convicted* are subsumed within the charged offense." 485 Mich at 45 (emphasis added). As explained below, this analysis makes sense when determining whether a lesser conviction is necessarily included or cognate, but not in determining whether two convictions are the same for purposes of the multiple-punishments prong of the Double Jeopardy Clause.

At least one state has applied a modified-*Blockburger* analysis when an offense is defined by a statute providing several alternatives. *State v Vallejos*, 129 NM 424, 428; 9 P3d 668, 672 (NM App 2000) (in double jeopardy cases, where an offense is defined by a statute providing several alternatives, the court focuses on the legal theory of the case and disregards any inapplicable statutory elements).

First, this Court should not adopt a *Wilder*-type analysis to determine whether a multiple-punishments double-jeopardy violation has occurred because it would be inconsistent with both *Blockburger* and *Ream*, which specifically held that one must isolate the abstract legal elements of the offense, as opposed to the actual proof of facts adduced at trial. *Ream*, 481 Mich at 235 n 12. Indeed, the United States Supreme Court has held that if the commission of one offense is a means of proving an element of a greater offense, but not the exclusive means, it is not viewed as a true lesser offense under *Blockburger*, and multiple punishments are permitted. *United States v Woodward,* 469 US 105, 108; 105 S Ct 611; 83 L Ed 2d 518 (1985) (defendant could be convicted of making a false statement to an agency of the United States and for willfully failing to report that he was carrying in excess of $5,000 cash into the United States because proof of a currency reporting violation does "not necessarily" include proof of a false statement offense). The *Woodward* Court reached this result despite the fact that the very same act – answering "no" on a United States Customs form – was used to prove both offenses and instead compared the statutory elements of the two offenses in finding the two statutes established two separate offenses permitting separate punishment for each.

Second, because the *Blockburger/Ream* test is simply an attempt to determine legislative intent, it is more appropriate to apply it to the language as drafted by the legislature than to the wording of a particular criminal indictment or information.

Third, continuing to "consider the entire statute even when it contains several alternatives," as *Ream* directed, when analyzing whether a multiple punishments double jeopardy violation has occurred "will better ensure that criminal perpetrators be punished for *all*, not merely *some*, of their offenses" and will ensure that the "policy and prosecutorial judgments assigned by the constitution to the legislative and executive branches are undertaken by those branches, rather than by the courts." *Smith*, 478 Mich at 323 (emphasis original). Thus this Court should not overrule *Ream* in order to adopt a *Wilder*-type approach.

I. The existence of prior convictions under MCL 257.625(9)(c) do not amount to an element of OWI/OWVI/operating with any amount of a specified controlled substance in one's body causing serious injury.

Finally, this Court's grant order asked the parties to brief "whether the existence of prior convictions under MCL 257.625(9)(c) amounts to an element of OWI causing serious injury . . . . " (15a.) The "third offense" designation under MCL 257.625(9)(c) is not an element of the crime; instead it is a sentencing enhancement. *People v Reichenbach*, 459 Mich 109, 127 n 19; 587 NW2d 1 (1998), citing *People v Weatherholt*, 214 Mich App 507, 511–512; 543 NW2d 34 (1995).

This holding is consistent with United States Supreme Court case law. See *United States v Watts*, 519 US 148, 155; 117 S Ct 633; 136 L Ed 2d 554 (1997) (holding that sentence enhancements are not construed as additional punishment for the previous crime of which the defendant was not convicted; rather, they act to increase a sentence "because of the manner in which [the defendant] committed the

crime of conviction"); *Monge v California*, 524 US 721, 728; 118 S Ct 2246; 141 L Ed 2d 615 (1998) ("Historically, we have found double jeopardy protections inapplicable to sentencing proceedings, because the determinations at issue do not place a defendant in jeopardy for an 'offense.' ") (citation omitted).

Moreover, *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000), specifically excepted "the fact of a prior conviction" from the rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt."

The People see no reason to question this Court's holding that a defendant's prior convictions are not an element of third-offense OWI given that MCL 257.625(17) states that a defendant's prior conviction "shall be established at sentencing." *Reichenbach*, 459 Mich at n 19. A prior conviction that does not need to be established until sentencing is not an element of a crime. *Apprendi*, 530 US at 490. Thus, the fact that a defendant has at least two prior OWI convictions is not an element of third-offense OWI under MCL 257.625(9)(c).

CONCLUSION AND RELIEF REQUESTED

A jury properly convicted Miller of operating while intoxicated, MCL 257.625(1)(a), and operating while intoxicated or visibly impaired causing serious injury to another person. Given that the multiple-punishments prong of the Double Jeopardy Clause was not violated, Miller should be held fully accountable for his crimes. The Court of Appeals' decision vacating Miller's conviction and sentence for violating MCL 257.625(1), as a third offense, should be reversed. Consequently, this Court should reinstate Miller's MCL 257.625(1)(a) conviction and sentence as a three-time drunk driver, MCL 257.625(9)(c).

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